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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RANDY F. GATES, Plaintiff and Respondent, v. RICH PFEIFFER, Defendant and Appellant.	G039450 (Super. Ct. No. 06CL00393) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Reversed and remanded.

Jennifer Mack for Defendant and Appellant.

Law Offices of Thomas F. Nowland and Thomas F. Nowland for Plaintiff and Respondent.

* * *

The moral to this case is that you cannot cure an evidentiary deficiency in your moving papers by putting the necessary evidence in your reply papers -- at least without giving the other side a chance to examine your new evidence and then reply to it in writing. In this case -- centering on a request for attorneys fees in the wake of a civil contempt proceeding -- the other side didn't get that chance. We must therefore reverse the $25,000 attorney fee award (based on two counts of contempt which generated fines of $1,000 each), and remand with directions to vacate the attorney fee order.

And one more thing. It turns out that the two counts of contempt on which the attorney fee order was predicated are invalid. Both counts arose over the mere fact that the defendant, a licensed attorney, *was merely present in a courtroom in open session* at a time when two individuals who had obtained a restraining order against him were also present. In the one instance, the attorney was representing a party, and in the other instance he was with his wife, who was a party. The counts are invalid, both as a matter of elementary construction of the contempt order (it was ambiguous) and as a matter of public policy (the attorney's clients had every right to have *him* with them in court).

Ordinarily we would direct the trial court to vacate the order and judgment of contempt under such facts. *The lawyer here had every right to be in the courtroom under both instances*.

However, the judgment of contempt was never challenged by way of writ petition. (Judgments of contempt are not appealable; they must be challenged by writ.) Nor was the issue of the underlying judgment of contempt raised in the opening brief in this case.[1] Under these circumstances, it would be unseemly for this court, on our own motion, to un-do the judgment. (Cf. *Scott v. Municipal Court* (1974) 40 Cal.App.3d 995, 996.)

However, what we can do is to express, if only in dicta, our opinion that the contempt judgment was a miscarriage of justice, and should never have been imposed.

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[1] At oral argument we asked the counsel for the attorney why he (the attorney) did not challenge the contempt judgment. Her answer was: The litigation initiated by the Gates had left him with no money to do so.

I. BACKGROUND

A. *The Parties*

To understand the sheer internecine quality of the underlying case, we describe the parties so to emphasize the family connections between them:

Defendant, Rich Pfeiffer, is the husband of Jennifer, plaintiff Randy Gates' ex-wife. Gates' attorney is his own brother, Thomas Nowland. The party who defendant Pfeiffer was representing in court (and which representation became one of two counts of contempt) was Dana Ballard, who is Randy Gates' wife's Amy's ex-husband, and also apparently related to two other people mentioned in the restraining order, Duncan Ballard and Emily Ballard.

That is, this is a feud between (1) an ex-husband, his current wife, and his attorney brother (and two other members of his current wife's ex-husband's family) against (2) the attorney successor husband of the ex-wife, the ex-wife, and the ex-husband of the ex-husband's wife.

B. *The Restraining Order*

In a previously unpublished opinion, *Gates v. Pfeiffer* (May 18, 2007, G036995) [nonpub. opn.] [2007 WL 1475309] (*Gates v. Pfeiffer I*), this court affirmed a restraining order directed against attorney Rich Pfeiffer, the terms of which were, basically: Stay away from Gates, Gates' wife Amy, and their two children by Pfeiffer's wife Jennifer.[2] As we noted in *Gates v. Pfeiffer I*, the order as originally filed on February 8, 2006, "if read literally, required Pfeiffer to avoid his own stepchildren during their visitation with his wife and at church." [2007 WL 1475309 at p. 1.] Thus a "less-expansive" re-done order was filed April 12, 2006, exempting visitation at Jennifer's (also Rich's) residence and a particular Lutheran Church in Orange.

The order was essentially the product of Rich Pfeiffer's rather poor interaction (to put it euphemistically) with his wife's ex-husband and their (the ex-wife's and the ex-husband's) children. Thus, *Gates v. Pfeiffer I* recounted as a "central

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[2] The Gates have another child, also mentioned in the restraining order.

example" of the "problematic relationship between the two families," an incident at a baseball game involving Pfeiffer's wife's son Aaron, in which Pfeiffer grabbed Aaron by the neck in order to get him into a car (presumably so as to take him home for the balance of visitation with Pfeiffer's wife) when Aaron insisted on going to play in a second game. (*Gates v. Pfeiffer I, supra* [2007 WL 1475309 at p. 2].) Noting that the sufficiency of the evidence for the order was not challenged on appeal -- now we know why -- this court affirmed the order as against two evidentiary challenges: The first challenge was that Pfeiffer was not allowed to cross-examine the children. We held the issue was waived because Pfeiffer essentially agreed not to call them. The second challenge was that Pfeiffer was not allowed to call Amy's ex-husband Dana Ballard to the stand to impeach Amy on the theory that Amy was wont to make false accusations of child molestation. (We held that issue was too tangential to the case at hand, particularly given that no allegations of child molestation had been leveled against Pfeiffer.) [2007 WL at pp. 1-5.]

The operative language of the civil harassment restraining order, in its "re-done" version of April 12, 2006, states, at section (7)[3]: "You must stay at least (*specify*) 100 yards away from" and lists seven categories, items "a." through "g." Items "a." through "g." (presented as separate paragraphs, which is how a reader of the restraining order would encounter them) are:

"a. The person listed in (1) [Randy Gates],

"b. The people listed in (11) ["Amy Gates, Aaron Gates, Megan Gates, James Gates, Duncan Ballard, Emily Ballard"]

"c. The home of the persons in (1) and (11)

"d. Jobs or workplaces of the persons in (1) and (11)

"e. Vehicle of person in (1) Vehicles of persons in (11)

"f. The protected children's school or child care

[3] In the actual restraining order, the "7" has a circle around it, as do all other sections. We use the parentheses to avoid fiddling with the "symbol" function in our word processing program.

"g. Other (*specify*) Excluding Jennifer Gates Pfeiffer's residence and excluding St. John's Lutheran Church in Orange."

Section (7) ends with the language: "This stay away order does not prevent the person in (2) [Rich Pfeiffer] from going to or from *that person's home or place of work*." (Italics added.)

C. *The Alleged Violations of the Restraining Order*

About February 1, 2007 -- that is, while *Gates v. Pfeiffer I* was still pending in the Court of Appeal, where it would remain for another three and a half months -- Randy Gates filed, ex parte, an order to show cause re contempt, alleging seven counts of violation of the April 12, 2006 restraining order. Since the trial court would (on April 18, 2007) ultimately find violations on only two of these seven counts -- counts 2 and 4 -- we will restrict our discussion to those counts. However, we should point out now that both counts 2 and 4 did not arise out of the sort of interactions that had generated the restraining order. Rather, remarkably enough, both were based on Pfeiffer's presence in a courtroom under circumstances where Randy Gates and his wife Amy were simply "likely" to also be there.

We quote the relevant language from the trial court's order and judgment in the margin.[4] Count 2 was based on this: Pfeiffer appeared at a court hearing on

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[4] Here are the findings on counts 2 and 4 verbatim, albeit underlining has been omitted and normal paragraphing inserted:

"With respect to Count 2, the Court finds that the contemnor appeared at a hearing on December 19, 2006 in Department L-62, where he was not a party. He was aware that it was virtually certain that Randy and Amy Gates would attend the hearing, since this proceeding was filed by Randy Gates against his ex-wife (contemnor's present wife.) He was aware of the terms and conditions of the restraining order. Contemnor, who is an attorney, was keenly aware that the issue of whether he could come within 100 yards of Randy Gates and Amy Gates in or near a courtroom was in dispute because the issue had arisen before on October 27, 2006 in the same department. He did not obtain a modification of the restraining order prior to this intentional conduct. After contemnor and the Gates enter[ed] the courtroom, the issue was brought before Commissioner Posey, who did not remove Mr. Pfeiffer from the courthouse. However, Commissioner Posey also indicated that the issue of contempt was to be decided another day. Contemnor continued to stay in the courtroom. The Court finds this a willful violation of the restraining order. Contemnor contends that the fact that his counsel asked him to specially appear for him at this hearing excuses these actions. This Court disagrees.

"With respect to Count 4, the Court finds that the contemnor knowingly and willfully agreed to represent Dana Ballard, the ex-husband of Amy Gates, when he knew to a virtual certainty this would place him in close proximity

December 19, 2006, in Commissioner Walter Posey's department (L-62[5]). The proceeding had been filed against Pfeiffer's wife, Jennifer, by Randy and Amy Gates, and it "was virtually certain" that Randy and Amy Gates would be at the hearing.[6] Interestingly enough, the trial judge's judgment of contempt appears to describe Pfeiffer's mens rea as a function of something that was itself in dispute: "Contemnor, who is an attorney, was keenly aware that the issue of whether he could come within 100 yards of Randy Gates and Amy Gates in or near a courtroom *was in dispute* because the issue had arisen before on October 27, 2006 in the same department." (Italics added.)

The reference to October 27 in the order concerning count 2 is significant, because Pfeiffer's appearance at a hearing that day formed count 1 of the contempt counts, though it did not form the basis of an actual finding of contempt. The trial judge's point seems to have been that the in-courtroom events of October 27, 2006, were significant by way of showing that Pfeiffer knew showing up, at some future date, in the same courtroom as either of the Gates, regardless of why, would prompt the Gates to *assert* that the restraining order had been violated, and the foreseeability of their *assertion of violation* was *itself* enough to sustain a contempt count given that Pfeiffer had failed to "obtain a modification of the restraining order." That future time, it turns out, was about two months later, on December 19, when Pfeiffer accompanied his wife -- who clearly had to be in the courtroom -- to the courtroom. Implicit in the court's statement about

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to Amy Gates in violation of the restraining order if he personally appeared for any of the hearings related to this litigation.

"On January 2, 2007 contemnor appeared in Department L-51 at Lamoreaux Justice Center. Nevertheless, on the Amy Gates vs. Dana Ballard lawsuit, he willfully and knowingly violated the restraining order, pushing in front of the Petitioner and his wife when the courtroom door was opened. Contemnor had knowledge that Randy and Amy Gates were waiting for the courtroom to open, yet continued to proceed to the courtroom door and violated the restraining order. Again, contemnor, who is an attorney, was keenly aware that the issue of whether he could come within 100 yards of Randy Gates and Amy Gates in or near a courtroom was in dispute because the issue had arisen before. He did not obtain a modification of the restraining order prior to his intentional conduct."

[5] The L stands for "Lamoreaux," as in the Lamoreaux Justice Center, a building in Orange, California where family and child custody cases are typically heard in Orange County. The center is about four miles away from the main courthouse, which is in Santa Ana.

[6] While Pfeiffer did not act as his wife's attorney, he was accused of "staring menacingly" at the Gates, pacing back and forth, and having Amy Gates served -- by a paralegal from another attorney's office -- with papers in a case involving Dana Ballard that showed he would be representing Ballard.

modification is the idea that any doubt about the "dispute" involving courtroom appearances was being resolved against Pfeiffer.

Count 4 involved a lawsuit brought against Randy Gates' wife Amy's ex-husband Dana Ballard, in which Pfeiffer had been retained to represent Ballard as an attorney. The trial court mentioned Pfeiffer's "pushing in front" of Randy and Amy as they were "waiting for the courtroom to open," but at the same time seems to predicate the contempt on Pfeiffer's being "keenly aware" that there was a "dispute" over "whether he could come within 100 yards of Randy Gates and Amy Gates in or near a courtroom." Again, the trial court's point again seems to have been that since the issue had "arisen before," that fact alone established the requisite intentionality to hold Pfeiffer in contempt.

The two sustained counts of contempt resulted in fines of $1,000 each. However, since the order and judgment of contempt was filed (and served) on April 18, 2007 -- while *Gates v. Pfeiffer I* was pending -- payment of the fines was stayed, pending the decision in *Gates v. Pfeiffer I*. The appeal was decided on May 18, 2007. As noted above, no appeal was filed from the April 18, 2007 order and judgment of contempt.

One more aspect of the case should be noted, since it deals with the proceedings in *Gates v. Pfeiffer I*: In January 2007, which was before oral argument had been scheduled, Randy and Amy Gates sought, *in the Court of Appeal*, to hold Pfeiffer in contempt for the same things that the trial court would eventually consider in April. This court was, to say the least, unimpressed with the tactic. At the very least it conveyed the impression of a rather transparent and gratuitous attempt to impugn Pfeiffer's character during the pendency of the appeal. And the attempt to hold Pfeiffer in contempt in the Court of Appeal was obviously filed in the wrong court, given that there was nothing in this court, at the time, which involved *enforcing* the restraining order. The only pending appeal involved *evaluating* it. This court thus denied the application "in this court," albeit without prejudice to the Gates to seek enforcement of the restraining order at the trial level. To be fair to the Gates, though, we must point out that (as Randy Gates would later assert in an opposition to a motion to dismiss the contempt action), filing in the

Court of Appeal had been prompted by the *trial court's* clerk expressing a "reluctance to set a hearing due to the fact that the case was on appeal."

D. *The Attorney Fee Fight*

With the order and judgment of contempt filed April 18, the Gates began a quest for attorneys fees. One week later the Gates gave notice of a hearing then set for May 11, 2007, in which they would seek their attorney fees. That hearing got continued to May 18, which was, coincidentally, the date we affirmed the underlying restraining order in *Gates v. Pfeiffer I*.

The attorney fee hearing was continued again to May 25, on which date Randy Gates filed an actual written motion for attorney fees, pursuant to section 1218, subdivision (a) of the Code of Civil Procedure. That motion requested $41,630.08 in fees. It was supported by a one-page invoice from Randy Gates' attorney, which itself (other than for such items for photocopying and faxes) was supported by two, conclusory lines:

The first was: "Billable Time Atty. at $300.00/hour" and giving, under the heading "Quantity," the number "82.50" and under the heading "Amount" $24,750.00."

The second was: "Billable Time Leg. Asst. at $200.00/hour" and giving, under the respective Quantity and Amount headings, the numbers "77.40" and $15,480.00."

And that was it. Gates' attorney's and his assistant's supporting declarations gave no more substantive information about how those 82.50 attorney hours and 77.40 legal assistant hours were spent.

The motion was not heard on May 18. Indeed, it would not be ultimately heard until August 16, 2007. In the meantime, Pfeiffer filed an unsuccessful attempt to have the trial court reconsider the contempt finding on the theory that, at least as regards the January 2 contempt, even the family support division had recognized the importance of Dana Ballard's right to have the counsel of his choice -- though, ironically, the family support division had done so in a motion to disqualify Pfeiffer from representing Ballard.

The interim also gave Pfeiffer a chance to file written opposition to Randy Gates' attorney fee request. The dates are significant here: Pfeiffer's written opposition was filed on July 24, and with a view toward a hearing then set for August 17, 2007. (The 17th date might be a typo, since the hearing would ultimately be held on the 16th.) The opposition argued that Gates had provided no "documents or other items to support his claim for attorney fees." In that regard, the opposition also argued that Gates had "forfeited" the right to request attorney fees because, back in April, the trial court had ordered "'all affidavits and declarations in support for that motion for attorney's fees" be filed by April 27, and they hadn't.

Three days later, on July 27, Gates responded with a "reply to" Pfeiffer's opposition, in which he asserted that his declaration that he had worked x hours "on a particular case" (the phrase is significant, as will be shown below) was sufficient to support an award of fees. To this he appended yet another conclusory one-page "invoice" -- except it was called a "billing statement" and the numbers for attorney time were now 178.60 hours and $53,580.00 and for legal assistant time were 176.40 hours and $35,280.00, which, with faxes and mileage, came to a grand total of $90,631.49.

But he also included, in his reply papers, one more thing: An itemized attorney and paralegal timesheets detailing how he arrived at the 178.60 and 176.40 hour figures. Noteworthy is that the very first entry for the attorney timesheet was an aggregate time entry for *all* work done in "Jan-Dec. 2006," which amounted to 93.25 of the 178.60 hours. The paralegal timesheet was more detailed for 2006, including entries beginning January 19, 2006 on things which obviously went beyond -- to use the key phrase from section 1218, subdivision (a) -- "the contempt proceeding." Thus there were entries for things like research for "application pleading" in January 2006 (even prior to the obtaining of a restraining order) and research on "SLAPP cases and motions" in the same month.

There was, in short, no attempt in either timesheet to isolate *the time spent on the contempt*. The timesheets appear to be obvious compilations of *all* time Gates' attorney and his paralegal had spent on the entire Gates-Pfeiffer family feud.

The attorney fee order was heard August 16, 2007, in the Santa Ana main branch of the Orange County Superior Court, and took both morning and afternoon sessions. When the afternoon session began, Pfeiffer's attorney was en route from the Lamoreaux Justice Center in Orange, which is where most family law and juvenile dependency cases are heard. Traffic had delayed him, and Pfeiffer, addressing the court in pro per., asked for a continuance until he got there. The request was denied. There is nothing in either the morning or afternoon sessions to suggest that Pfeiffer backed off his argument that the fee request had been "forfeited" because documentation had not been timely filed. More to the point, there is nothing to indicate that the court continued proceedings so as to allow Pfeiffer the chance to address the timesheets submitted with the reply papers. Rather, the court ruled that afternoon, awarding $25,000 in fees. A formal written order to that effect was filed September 14, 2007, and Pfeiffer timely appealed from *that* order in a notice of appeal filed September 27, 2007.

II. ANALYSIS[7]

A. *The Fee Order*

Courts must distinguish between fees awarded pursuant to section 527.6 of the Code of Civil Procedure[8] and fees awarded pursuant to section 1218. The former are fees awarded to *obtain* a restraining order. The latter are fees incurred to *enforce* it. Thus each statute has its own fee provision: subdivision (i) in section 527.6, and subdivision (a) in section 1218. Significantly, subdivision (i) in section 527.6 provides for fees to the "prevailing party" -- that is, the party who has just obtained a restraining

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[7] Pfeiffer's opening brief is framed in terms of two issues -- the trial court's refusal to wait for Pfeiffer's attorney to get to Santa Ana from the Lamoreaux center in Orange before concluding the afternoon proceeding, and, of course, the attorney fee order itself as an abuse of discretion. While Gates filed a respondent's brief in this appeal, he might as well have filed none, since his brief makes no effort to substantively defend either of the trial judge's rulings. In order to focus the parties on the key issue of the evidentiary sufficiency for the attorney fee award (which indeed had been raised by Pfeiffer at the trial level and is raised, albeit not as clearly as it might have been, in the opening brief), this court issued a supplemental briefing order asking both parties to be prepared to discuss the issue of the evidentiary sufficiency of the attorney fee award in light of the main support therefor being in the reply papers, and also inviting both parties to give their views on that specific problem in supplemental briefing.

We also, given the remarkable fact that Pfeiffer had been held in contempt for doing little more than simply representing a party in court when the Gates "were likely" to be there, asked both parties for their views on the validity of the underlying contempt.

[8] All further statutory references are to that code.

order, which subdivision (a) in section 1218 provides for fees to "the party initiating the contempt" for fees which that party incurred "in connection with the contempt proceeding."

That is, section 1218, subdivision (a) is not a general prevailing-party-at-the end-of-litigation statute (as is, say, section 1717 of the Civil Code). It is limited to fees incurred with regard to a specific contempt proceeding -- a point illustrated by *Trans-Action Commercial Investors, Ltd. v. Fermaterr, Inc.* (1998) 60 Cal.App.4th 352 (*Trans-Action*).

Until 1995, there was no statutory authority to award attorney fees arising out of contempt proceedings; the provision in section 1218, subdivision (a) now allowing an award of attorney fees was not there. (See *Trans-Action, supra,* 60 Cal.App.4th at pp. 365-366, discussing *Baugess v. Paine* (1978) 22 Cal.3d 626.) In *Trans-Action,* an attorney had been sanctioned $50,000 in attorney fees because of his constant attempts to sneak in material which had been ruled off limits in various in limine motions finally so angered the trial judge that a mistrial was declared. As part of the mistrial, the trial judge awarded the other side $50,000 in attorney fees.

That award did not stand up on appeal, even though subdivision (a) of section 1218 had been enacted two years before. In discussing the various possible statutory bases for the $50,000 award, the *Trans-Action* court rejected the then-recently enacted attorney fee provision of section 1218, because the statute "did not allow for recovery of *all fees* resulting from the violation, but *only* those incurred in connection with the contempt proceeding itself." (*Trans-Action, supra,* 60 Cal.App.4th at p. 371, italics added.) The court also noted that the $50,000 attorney fee award was "disproportionate" to the $1,000 monetary fine contemplated under section 1218. (*Id*. at p. 366; accord, *Luckett v. Keylee* (2007) 147 Cal.App.4th 919, 926 ["A party found in contempt for disobeying a court order may be fined up to $1,000 and ordered to pay the

attorney's fees of a party who brings a contempt motion, *with the fees limited to those incurred in connection with the contempt motion*."].[9])

The upshot of *Trans-Action* is, thus, that Gates certainly could not claim, as sanctions under section 1218, the entirety of the fees claimed for the whole of the Gates-Pfeiffer litigation. For example, the statute would not encompass fees incurred in 2006 to defend the initial restraining order on appeal.

Gates, however, unquestionably did just that. First, he never claimed that his conclusory invoice submitted with his moving papers (asking for a lump sum of about $40,000) represented only those fees incurred in connection with the contempt, as distinct from other aspects of the litigation, including the defense of the restraining order in *Gates v. Pfeiffer I*. And, as shown by the breakdown he ultimately did submit (more on that soon), the fees he did claim in his moving papers included all fees incurred, beginning in 2006 (when the first contempt was in October), and fees for things not in connection with the contempt. In sum, the documentation supporting the $40,000 lump sum figure submitted with the moving papers was useless by the criteria that the trial court was obliged to apply in section 1218, subdivision (a).[10]

Now, it is certainly plausible that within the detailed timesheet submitted on July 27, one could extract $25,000 worth of work "in connection with" the contempt proceeding, though even then one must note that Gates himself made no attempt to correlate any given entry with work on the contempt proceeding. In any event, those timesheets were filed after Pfeiffer had filed his reply papers and made an issue of Gates' *lack* of documentation. There is nothing in the record to indicate that the trial judge

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[9] Yes, *that* Luckett. The point is significant because the trial court in *Luckett v. Keylee*, obviously exasperated at John Luckett's filing vexatious litigation and then failing to post a vexatious litigant's bond, wanted to add a little sting to its order by making Luckett pay $3,500 in attorney fees. The point was: There was no authority for those fees, and the order was reversed.

[10] Part of the reason for the Legislature's confinement of attorney fees to only those incurred in connection with the contempt is to provide contemnors with a modicum of protection, precisely so trial judge's *don't* throw the book at them. (See *Fabricant v. Superior Court* (1980) 104 Cal.App.3d 905, 916 [discussing abuse if trial courts had "inherent power" to award fees in contempt proceedings: "Absent such safeguards, serious due process problems would result were trial courts to use their inherent power, in lieu of the contempt power, to punish misconduct by awarding attorney's fees to an opposing party or counsel."].)

continued proceedings so as to allow Pfeiffer the opportunity to analyze the entries, or that Pfeiffer waived the issue. That late afternoon Pfeiffer, like a ship in a battle, went down still objecting to the documentation submitted.

The applicable rule is stated in *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, footnote 8, albeit in the context of summary judgment: "Although, the inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case, the trial court's consideration of such additional evidence is not an abuse of discretion so long as the party opposing the motion for summary judgment has notice and an opportunity to respond to the new material. [Citation.] Here plaintiffs did not object to the new evidence, did not request a continuance, and did not even suggest that additional evidence could be presented on the issue of whether warnings regarding the risk of death from an untreated pelvic infection should have been given to the physician."

Here, since the only evidence on which the trial court could have properly predicated a $25,000 order was submitted in the reply papers, and since the opposing party did not have an "opportunity to respond" to the new material, it was a manifest abuse of discretion to render an order upon it. And since there was no proper evidence in the moving papers on which the trial court could have predicated its order, quite literally nothing supports the order. We must reverse it in its entirety.

B. *The Two Contempts*

A judgment of contempt is not appealable; it can only be reviewed, if at all, by writ. (E.g., *Bermudez v. Municipal Court* (1992) 1 Cal.4th 855, 861, fn. 5 ["as the Court of Appeal observed (and as Bermudez concedes), a judgment or order of contempt is not, in and of itself, appealable"]; *People ex rel. DuFauchard v. U.S. Financial Management, Inc.* (2009) 169 Cal.App.4th 1502, 1510 ["'Indeed, the contempt judgment is not appealable but must be reviewed, if at all, by writ'"]; *City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234, 242-243 ["Indeed, the contempt judgment is not appealable. (Code Civ. Proc., § 904.1, subd. (a)(1).) It must be reviewed, if at all, by writ."].)

There is no statutory deadline to bring a writ petition to attack a judgment of contempt under section 1218. In such cases, while there is no "absolute deadline" to file such a petition, the general rule is that a writ must be brought "no later than *60 days* after service of the notice of entry of the challenged order," which is the "same general deadline for appeals." (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 15:146, pp. 15.70.12 to 15.70.13.)

Ironically -- because of lack of funds from the very contempt litigation giving rise to this attorney fee case[11] -- Pfeiffer did not challenge the April 2007 judgment of contempt (as he might have done) in a writ petition filed within 60 days of the entry of the judgment. Nor did he attack the judgment in the opening brief in this appeal, which was filed in July of 2008; the issue did not appear until we raised it on our own in a letter to the parties in contemplation of oral argument in early 2009.

As such, it is simply too late to *do* anything about the judgment of contempt. (See *People v. Drake* (1977) 19 Cal.3d 749, 758 [refusing to consider opening brief as a "petition for an original writ of mandamus to review the trial court's ruling" because of the "late hour" at which the issue was raised, and thus the request was "tardy"];[12] *Scott v. Municipal Court*, *supra*, 40 Cal.App.3d 995, 996 [six months delay in seeking a writ of review from judgment of contempt required affirmation of judgment].)

But it is not too late to *say* something, even if only in dicta. And, indeed, the validity of the original judgment of contempt may still arise in other proceedings, such as disciplinary proceedings before the state bar, and in those proceedings what we are about to say might have some relevance.

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[11] See footnote 1, *ante*.

[12] *Drake* essentially dealt with whether the People could appeal the order modifying a verdict to that of a lesser included offense, and used an earlier version of Penal Code section 1238, subdivision (a)(6), a fact which rates it a red flag in Westlaw. But *Drake's* observation as to whether the court might treat the People's purported appeal as a writ under the circumstances remains unaffected by any subsequent change to the statute.

The restraining order was ambiguous in its scope about whether it applied to the Lamoreaux family law center, because it exempted Pfeiffer's "place of work." That fact was recognized by the trial judge who noted that Pfeiffer was aware that the question of the restraining order's application was in "dispute."

The ambiguity is particularly acute as to Pfeiffer, whose family-oriented law practice requires him to appear in juvenile dependence cases in various departments at the Lamoreaux courthouse on an almost daily basis.

Section 527.6, subdivision (j) makes disobedience to restraining orders punishable under section 273.6 of the Penal Code. As a penal law, the restraining order was subject to the so-called "rule of lenity," which requires that ambiguities in penal laws be construed in favor of defendants. (See *Lopez v. Superior Court* (2008) 160 Cal.App.4th 824, 832 [applying rule of lenity to gang-activity injunction]; see generally *Crandon v. U.S.* (1990) 494 U.S. 152, 158 [to the degree that language or history of penal statute is "uncertain," rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct"].) The ambiguity about "place of work" should have been construed in Pfeiffer's favor, particularly given his role in each count as attorney for a party (his wife and Dana Ballard) and in doing what attorneys do -- show up in court to represent their clients.[13] In such a setting, any danger that Pfeiffer would act in the sort of obnoxious way that engendered the restraining order in the first place -- the sort of inter-family semi-stalking we alluded to in *Gates v. Pfeiffer I* -- was minimal indeed, since it would literally take place before a judge's eyes. The two counts thus should not have been sustained, and, in any future disciplinary proceeding, that fact should be taken into account.

Finally, as a matter of public policy, the order of contempt should not have been construed to include the Lamoreaux courthouse. The basic formulation, originally stated in *People v. Crovedi* (1966) 65 Cal.2d 199, 207 and repeated often, is that while a

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[13] Collateral aspects of both contempts -- Pfeiffer's pacing back and forth in the hallway, "staring menacingly" at the Gates, and pushing past them when he went into the courtroom -- are too petty to dignify as separate contempts apart from the fact that he, as a lawyer, was simply in the courthouse.

litigant "has no *absolute* right to be represented by a particular attorney, still the courts should make all reasonable efforts to ensure that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney." (See *People v. Jones* (2004) 33 Cal.4th 234, 242 [recent iteration of rule].) Here, it is clear that Dana Ballard and Pfeiffer's wife should be accommodated in their desire to have Pfeiffer to be their "particular attorney." Such a reasonable accommodation would have been readily accomplished by not applying the restraining order to virtually the *last place* where the Gates had any legitimate fear that Pfeiffer would in some way harass them.

III. CONCLUSION

The $25,000 attorney fee order is reversed, with directions to the trial court to enter a new order denying the motion for fees, based on the April 18 contempt order and judgment, in its entirety.

We opine, though we cannot do anything about it, that the judgment of contempt is not valid. Attorneys have to be able to go to court, particularly the court where they regularly appear.

Pfeiffer is to recover his costs on appeal.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.